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November 5, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172*

Dear Ms. Dortch:

Since the inception of this proceeding, there has been significant doubt regarding whether Verizon faces sufficient facilities-based competition to warrant forbearance from Section 251(c)(3) loop and transport unbundling obligations. The undersigned carriers have already submitted substantial information into the record demonstrating that Verizon has not met the facilities-based competition threshold for forbearance in any of the six Metropolitan Statistical Areas ("MSAs") for which it is seeking forbearance.¹ In this filing, the undersigned carriers once again submit evidence

¹ See, e.g., Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Mar. 5, 2007) ("*XO, et al. Comments*"); Reply Comments of Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, WC Docket No. 06-172, (filed Apr. 18, 2007) ("*XO, et al. Reply Comments*"); Letter from Broadview Networks, Inc., et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Sept. 4, 2007) ("*September 4th Ex Parte*").

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mark for facilities-based market penetration set by the Commission in the *Omaha Forbearance Order*.² Importantly, this evidence is based on data that Verizon itself has placed in the record. Although this data has already been shown to be inaccurate and biased in Verizon's favor, the very fact that it shows the *Omaha Forbearance Order* standard has not been met gives the Commission even more reason to reject Verizon's Petitions.

As noted in previous submissions in this docket,³ the Commission's decision to grant Qwest partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA was grounded in part on the significant market share that the major cable competitor (*i.e.*, Cox Communications, Inc.) had been able to achieve. The Commission found that at the time forbearance was granted, Cox had captured **BEGIN CONFIDENTIAL *** [] *** END CONFIDENTIAL** of the residential access line market.⁴ The Commission stated that it found "compelling that Qwest has less than [**confidential *** []** percent of the market for residential access lines in Qwest's service territory in the MSA, based upon Qwest's and Cox's own submitted data."⁵ However, the competitive environment in each of the six MSAs for which Verizon is seeking forbearance in the instant docket differs greatly from the competitive environment that existed in the Omaha MSA at the time of the *Omaha Forbearance Order*. The data detailed below unequivocally shows that the *Omaha Forbearance Order* cable market penetration threshold is nowhere close to being met in the Boston, New York, Philadelphia, Pittsburgh, Providence, or Virginia Beach MSA.⁶

Verizon has failed to produce any credible data showing the specific residential (or enterprise) market penetration achieved by individual competitive carriers using their own facilities (including their own local loops). The only statistical evidence that has been produced by Verizon to demonstrate the level of loop-based competitive market penetration is its submission of E911 carrier line count data. The undersigned carriers and others have proven without question that Verizon's E911 data substantially overstates the market shares of all

² *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd* *Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) ("*Qwest Omaha*").

³ *See, e.g., September 4th Ex Parte*, at 12.

⁴ *Omaha Forbearance Order*, at ¶¶ 28, 39.

⁵ *Id.*, at ¶ 28.

⁶ Importantly, the undersigned carriers maintain that the level of market penetration achieved by competitive carriers is an important factor – but by no means the only relevant consideration – in the Commission's forbearance analysis.

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competitive carriers, including the cable companies.⁷ With respect to business customers, for example, Verizon itself has admitted that E911 line count data can be expected to inflate the market share of competitors by 100%.⁸

Nevertheless, the raw (and, therefore, inflated) E911 carrier line counts submitted in the docket by Verizon can be used to calculate estimates of the *absolute maximum potential* level of loop-based competition in the markets at issue. In other words, Verizon's raw E911 data can be used to estimate an upper bound of loop-based market penetration, with full knowledge that the actual level of loop-based market penetration is substantially lower than suggested by the E911 data computations. The unadjusted, maximum possible levels of loop-based competitive market penetration calculated using Verizon's E911 data are contained in Table 1 below.

We cannot overemphasize that there is no remaining issue as to whether E911 line count data exaggerates competitive carrier activity; however, even using the E911 data Verizon has submitted into the record to identify competitive activity, the results do not support Verizon's contention that there is sufficient facilities-based competition to warrant forbearance. Table 1 below includes unadjusted E911 line count data, even though it is well established that the actual share for cable carriers is substantially less than the share calculated from uncorrected E911 listings. The uncorrected share for cable competitors in each of the six Verizon MSAs (based on raw E911 listings provided by Verizon) is as follows⁹

⁷ See, e.g., *September 4th Ex Parte*, at 13-20.

⁸ See Rebuttal Testimony of Harold E. West III, *Application of Verizon Virginia Inc. and Verizon South Inc. For a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, State Corporation Commission of Virginia, Case No. PUC-2007-00008 (filed Jul. 16, 2007) ("*West Rebuttal Testimony*"), at 7.

⁹ Source: Reply Comments of Verizon – Reply Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo, WC Docket No. 06-172 (filed Apr. 18, 2007), at Attachment D, Exhibits 1.A (New York) through 1.F (Virginia Beach), and Exhibits 3.A (New York) through 3.F (Virginia Beach).

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Table 1: Uncorrected Market Share Loop-Based Carriers ¹⁰			
Market	Residential	Business	Combined
Boston			
New York			
Philadelphia			
Pittsburgh			
Providence			
Virginia Beach			

*** END HIGHLY CONFIDENTIAL ***

A more accurate measure of market share was developed by correcting Verizon's unadjusted E911 line count data for the business market for the expected error in that data. Verizon has acknowledged that "ratios of business E-911 listings to access lines in the 2:1 neighborhood are not unexpected."¹¹ In addition, the exact error rate between E911 listings and switched business lines is known for Cox in the Virginia Beach MSA, where an examination of the data in a proceeding before the Virginia State Corporation Commission revealed that 65% of the E911 listings for Cox do not correspond to actual business lines served by Cox.¹² Importantly, correcting the E911 listings to account for the overstatement of business lines provides a *conservative* estimate of loop-based market share because residential E911 listings also inflate competitive activity. However, Verizon has not admitted to a ratio that can be used

¹⁰ Loop-based competitors in each of the six Verizon markets include the existing cable-based carrier (*i.e.*, Cablevision, Charter, Comcast, Cox, and Time Warner Cable), as well as the cable over-builder RCN. Although some other entrants may sometimes serve individual enterprise customers with their own loop facilities, there is no means to isolate such activity based on the data submitted by Verizon and, in any event, as explained below, such activity is *de minimis*.

¹¹ *West Rebuttal Testimony*, at 7.

¹² See Pre-Filed Direct Testimony of Joseph Gillan on behalf of Cox Virginia Telecom, Inc., *Application of Verizon Virginia Inc. and Verizon South Inc. For a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, State Corporation Commission of Virginia, Case No. PUC No. 2007-00008 (filed Jun. 1, 2007), at 19.

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to correct the residential E911 line count data. A more accurate share for cable competitors in each of the six Verizon MSAs (based on the correction of Verizon's business E911 line counts) is as follows:¹³

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Table 2: Corrected Market Share Loop-Based Carriers			
Market	Residential	Business	Combined
Boston			
New York			
Philadelphia			
Pittsburgh			
Providence			
Virginia Beach			

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As noted above, residential E911 line counts also have been proven to be inflated. For example, in a recent submission, Cavalier showed that E911 database line counts indicate that it serves 44% more residential lines in the Philadelphia and Virginia Beach MSAs than it actually serves.¹⁴ If corrections were made to account for the overstatement of residential lines by Verizon, the residential market shares contained in Table 2 would be substantially lower.

As the above Tables demonstrate, Verizon remains the dominant provider of loop-based switched services in each of the six MSAs at issue and the level of cable penetration that existed in Omaha at the time of the *Omaha Forbearance Order* is much greater than the level of cable penetration that exists in either the residential or business market in any of these six MSAs. Indeed, on a combined basis (residential and business), loop-based competition does not exceed **BEGIN CONFIDENTIAL *** [] *** END CONFIDENTIAL** percent in any MSA, and loop-based competition in the business market (on a corrected basis) is between **BEGIN**

¹³ Table 2 is calculated by developing the switched business line estimates in each market (other than Virginia Beach) by applying the 2:1 ratio of E911 listings-to-business lines admitted by Verizon. The percentages for Virginia Beach are developed from the actual ratio known for that market for Cox Communications, with Verizon's 2:1 ratio used to adjust E911 listings attributed to other carriers.

¹⁴ See *September 4th Ex Parte*, at 20.

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CONFIDENTIAL *** [] *** **END CONFIDENTIAL** percent in five of the six markets. Thus, the maximum possible loop-based competitor market penetration in any of the markets is only approximately **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** the level found to exist in Omaha and, in most cases, it is only approximately **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** or less of the level found sufficient to justify a partial grant of forbearance in Omaha.

The conclusions called for by the E911-based analysis described above are confirmed by the data submitted in this docket to date by the cable companies operating in the six markets.¹⁵ For example, Comcast informed the Commission in its comments that it serves only approximately **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** percent of the homes it passes in the Boston MSA,¹⁶ **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** percent of the homes it passes in the Philadelphia MSA,¹⁷ and **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** percent of the homes it passes in the Pittsburgh MSA.¹⁸ These percentages are generally consistent with both the corrected and adjusted market penetration numbers contained in Tables 1 and 2. Of course, since Comcast does not pass every home in the Boston, Philadelphia, or Pittsburgh MSA, its actual market penetration in each of those MSAs is less than the percentages it has provided to the Commission.

Similarly, RCN has informed the Commission that the active phone lines it serves constitute approximately **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** percent of the homes that its network reaches in the Boston MSA,¹⁹ and **BEGIN CONFIDENTIAL** *** [] *** **END CONFIDENTIAL** percent of the homes that its

¹⁵ Seven days ago, the Chief of the Wireline Competition Bureau requested each cable competitor to submit access line counts for their residential and business customers by November 5, 2007, to the extent they have not already provided this information. *See, e.g.,* Letter from Dana Shaffer, Chief, Wireline Competition Bureau, Federal Communications Commission, to J.G. Harrington, Counsel for Cox Communications, Inc., WC Docket No. 06-172 (Oct. 29, 2007). We are confident that any additional data submitted by these companies will support the conclusions contained in this letter.

¹⁶ Comments of Comcast Corporation, WC Docket No. 06-172 (filed Mar. 5, 2007) (“*Comcast Comments*”), at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Letter from Philip J. Macres, Counsel to RCN Telecom Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 9, 2007), at Exhibit 2 (“*RCN Ex Parte*”).

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network reaches in the Philadelphia MSA.²⁰ Time Warner Cable has stated in the record that its voice service penetration to serviceable homes in the New York MSA was less than 10 percent in December 2006,²¹ and Time Warner Cable's *actual* share of the total residential market in the New York MSA is approximately **BEGIN CONFIDENTIAL *** [] *** END CONFIDENTIAL** percent.²² Again, these percentages are generally consistent with both the corrected and adjusted market penetration numbers contained in Tables 1 and 2.

Verizon likely will allege that the results contained in Tables 1 and 2 are not accurate because they do not include competition from loop-based non-cable competitors.²³ That allegation is specious. First, with respect to the residential market, no interested party – including Verizon – has suggested that today there are any non-cable loop-based competitors serving residential subscribers in any of the six MSAs at issue. Second, with respect to the business market, interested parties have submitted a considerable amount of data which shows that non-cable loop-based competition to business customers in the six MSAs is very small. Record evidence shows, for example, that for five of the six MSAs, the highest percentage of CLEC lit buildings in any wire center is *less than 1.5%*. In only one MSA, Virginia Beach, does CLEC lit building penetration exceed that percentage, and in the Virginia Beach MSA, the wire center with the highest penetration level is only 4.29%.²⁴ Further, XO recently submitted addressable building data to show the maximum theoretical reach of its fiber facilities.²⁵ XO calculated all business locations in the Boston, New York, Philadelphia, and Pittsburgh MSAs

²⁰ *Id.* As with Comcast, since RCN does not pass every home in the Boston or Philadelphia MSA, its actual market penetration in each of those MSAs is less than the percentages it has provided to the Commission.

²¹ Comments of Time Warner Cable, WC Docket No. 06-172 (filed Mar. 5, 2007), at 4-5.

²² Time Warner Cable's actual residential market share was calculated using Exhibit 3.A to Verizon's Reply Comments and Attachment 4 to the October 31, 2007 letter filed by Evan Leo on behalf of Verizon. Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 31, 2007) ("*Verizon Oct. 31st Ex Parte*"), at Attachment 4. Time Warner Cable's actual total business market share in the New York MSA cannot be calculated because Attachment 4 does not provide a comprehensible means of identifying Time Warner Cable's business lines.

²³ As explained in n.10, Tables 1 and 2 include the existing cable-based carriers (*i.e.*, Cablevision, Charter, Comcast, Cox, and Time Warner Cable), as well as the cable over-builder RCN.

²⁴ *See XO, et al. Comments*, at 46-49.

²⁵ *See* Letter from John Heitmann, Counsel to XO Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 30, 2007).

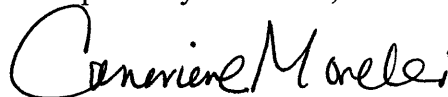
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that it could possibly serve in a commercially-reasonable manner with its own facilities and found that the addressable reach of its network ranges from a low of 1.6% in the Boston MSA to a high of 6% in the Philadelphia MSA.²⁶ Clearly, even with the addition of non-cable loop-based competition, the penetration levels achieved (or achievable in the near-term) by facilities-based carriers in the six Verizon markets for which Verizon is seeking forbearance come nowhere close to the penetration levels achieved by Cox in the Omaha MSA.

The undersigned carriers continue to believe strongly that the analytical framework applied in Omaha is badly flawed, from both a legal and an economic perspective.²⁷ However, accepting for the sake of argument that the Commission should apply the same analytical framework to the six pending Verizon Petitions, it is clear from the foregoing that the situation “on the ground” in the markets at issue is nothing like what the Commission considered in Omaha. Verizon has utterly failed to prove that loop-based competition has reached anywhere near the levels found to exist in Omaha. Verizon has been unable to adduce such proof because it does not exist. If the Commission is to adhere to the Omaha “precedent,” it must deny all six pending Verizon Petitions in their entirety.

Respectfully submitted,



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Genevieve Morelli

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NuVox Communications, and XO
Communications, LLC*

²⁶ *Id.*, at 10-11.

²⁷ For one thing, it is unreasonable to eliminate consideration of actual wholesale options in the markets at issue and to focus exclusively on retail market conditions. The Commission’s reliance in Omaha on a retail-only analysis – with a predictive judgment regarding what would occur post-forbearance in the wholesale market – has proven to be incorrect. *See, e.g., Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007) (“*McLeodUSA Petition*”).